Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-03–102 OF 2008
LOW HOP BING, SYED AHMAD HELMY AND MOHAMED APANDI JJCA
20 OCTOBER 2010

Contract — Damages — Breach of contract — Assessment of damages — Plaintiff awarded damages based on computation of 25% of contract value — Appeal against award — Whether plaintiff only entitled to nominal damages — Whether damages based on an estimate — Whether there was an appealable error in judge's award of damages

Tanjung Tiara Sdn Bhd ('the defendant'), the owner of 4,856 hectares of agricultural land ('the land') entered into a contract with Southwind Development Sdn Bhd ('the plaintiff') wherein it granted the latter the right to develop the land into an oil palm plantation. The plaintiff contractor was entitled to payment pursuant to the schedule of progress payments that was incorporated into the contract. The plaintiff then went on to institute an action against the defendant for repudiation and breach of contract. The trial judge found the defendant liable for repudiation and breach of contract and ordered damages to be assessed by the registrar. Upon assessment, the registrar awarded nominal damages of RM10 to the plaintiff. The plaintiff appealed against the award and the appeal was heard by a judge in chambers. At the appeal hearing the plaintiff adduced evidence as to how the damages ought to be computed. The plaintiff's witness gave evidence that the plaintiff ought to be awarded damages of RM6,747,613.43 as loss of profit, based on a computation of 25% of the contract value of RM26,990,453.73. The defendant in its evidence referred to another agreement ('the Golden Hope agreement') performed by a third party, which had adopted the same method used by the plaintiff and in which the contract value was RM2,726,669.70. The judge hearing the appeal set aside the nominal damages awarded by the registrar and substituted it with the sum of RM6,747,613.43. This was the defendant's appeal against that award. The defendant contended that the plaintiff was only entitled to nominal damages and that sum of RM6,747,613.43 was just an estimate and damages could not be based on an estimate. The plaintiff maintained that that the High Court judge had correctly awarded the damages on the basis of the plaintiff's computation in relation to the loss of profits. The sole issue for consideration in this appeal was whether there was an appealable error in the judge's award of damages.

Held, dismissing the appeal with costs:

(1) The assessment of damages being an exercise of discretion had to be

determined on the basis of the facts and circumstances established in each particular case. However, the authorities cited and relied upon by the defendant were not useful, in that they did not relate to repudiation and breach of a similar type of contract, ie to develop a relatively huge area of agricultural land into an oil palm plantation, or provide evidence to support the award of damages (see paras 12 & 22).

(2) The plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value. The defendant had not resisted the plaintiff's figure as unreasonable or unrealistic but had instead supported it with its own computation pursuant to the Golden Hope agreement, which actually arrived at the estimated profit of 33.27% of the contract value. In the instant appeal, the plaintiff's computation was not merely based on an estimate of the loss of profit. Such estimate was supported by the defendant's own evidence. In effect the estimate of 25% was actually lower than the 33.27% arrived at by the defendant (see paras 29 & 32).

(3) The present appeal from the registrar to the judge in chambers was by way of rehearing and the judge's award of damages was primarily based on his finding of facts, having regard to the evidence adduced at the proceedings for assessment of damages. There was no appealable error in the award of damages that warranted appellate interference (see para 33).

[Bahasa Malaysia summary

Tanjung Tiara Sdn Bhd ('defendan'), pemilik 4,856 hektar tanah pertanian ('tanah tersebut') memasuki kontrak dengan Southwind Development Sdn Bhd ('plaintif') di mana ia memberikan plaintif hak untuk membangunkan tanah tersebut kepada ladang kelapa sawit. Kontraktor plaintif berhak kepada pembayaran berikutan pembayaran-pembayaran kemajuan yang dijadualkan yang dimasukkan ke dalam kontrak. Plaintif kemudiannya memulakan tindakan terhadap defendan untuk penamatan dan kemungkiran kontrak. Hakim bicara mendapati defendan bertanggungjawab untuk penamatan kontrak dan memerintah ganti rugi ditaksirkan oleh pendaftar. Selepas penaksiran, pendaftar mengawardkan ganti rugi nominal sebanyak RM10 kepada plaintif. Plaintif merayu terhadap award dan rayuan tersebut didengar oleh hakim dalam kamar. Pada masa pendengaran rayuan, plaintif mengemukakan keterangan terhadap bagaimana ganti rugi tersebut patut dikira. Saksi plaintif memberi keterangan bahawa plaintif patut diawardkan ganti rugi sejumlah RM6,747,613.43 sebagai kerugian keuntungan, berdasarkan pengiraan 25% nilai kontrak sejumlah RM26,990,453.73. Defendan dalam keterangannya merujuk kepada perjanjian lain ('perjanjian Golden Hope') yang dilakukan oleh pihak ketiga, yang mana menguna cara sama yang digunakan oleh plaintif dan dalam mana nilai kontrak tersebut adalah RM2,726,669.70. Hakim yang mendengar rayuan mengetepikan ganti rugi nominal yang diawardkan oleh pendaftar dan menggantikannya dengan

sejumlah RM6,747,613.43. Ini adalah rayuan defendan terhadap award tersebut. Defendan berhujah bahawa plaintif hanya berhak kepada ganti rugi nominal dan bahawa jumlah RM6,747,613.43 tersebut adalah hanya anggaran dan ganti rugi tidak boleh didasarkan atas anggaran. Plaintif mengekalkan bahawa hakim Mahkamah Tinggi telah secara betul mengawardkan ganti rugi atas asas pengiraan plaintif berkaitan kerugian terhadap keuntungan. Satu-satunya isu untuk pertimbangan dalam rayuan ini adalah sama ada terdapat kesilapan yang boleh dirayukan dalam award hakim terhadap ganti rugi.

Diputuskan, menolak rayuan dengan kos:

(1) Penaksiran ganti rugi sebagai pelaksanaan budi bicara patut ditentukan atas asas fakta dan keadaan yang dibuktikan dalam setiap kes tertentu. Walau bagaimanapun, autorirti-autoriti yang dirujuk dan digunakan oleh defendan tidak boleh digunakan, di mana ia tidak berkaitan kepada penamatan dan kemungkiran kontrak jenis yang sama, iaitu untuk membangunkan kawasan yang besar tanah pertanian kepada ladang kelapa sawit, atau memberikan keterangan untuk menyokong award ganti rugi (lihat perenggan 12 & 22).

(2) Tuntutan plaintif untuk ganti rugi adalah disokong oleh anggaran dan pengiraan penting 25% daripada nilai kontrak. Defendan tidak menentang angka plaintif sebagai tidak munasabah atau tidak realistic tetapi sebaliknya menyokongnya dengan pengiraannya sendiri berikutan perjanjian Golden Hope, yang mana sebenarnya mencapai kepada keuntungan yang dianggarkan sebanyak 33.27% nilai kontrak. Dalam rayuan ini, pengiraan plaintif bukan semata-mata berdasarkan anggaran kerugian terhadap keuntungan. Anggaran sedemikian adalah disokong dengan keterangan defendan sendiri. Sebenarnya anggaran 25% tersebut adalah lebih rendah daripada jumlah 33.27% yang dicapai oleh defendan (lihat perenggan 29 & 32).

(3) Rayuan ini daripada pendaftar kepada hakim dalam kamar adalah melalui pendengaran semula dan award ganti rugi hakim adalah terutamanya berdasarkan dapatan faktanya, mengambilkira kepada keterangan yang dikemukakan di prosiding untuk penaksiran ganti rugi. Tiada kesilapan yang boleh dirayukan dalam award ganti rugi yang mewajarkan campur tangan mahkamah rayuan (lihat perenggan 33).]

Notes

For a case on breach of contract, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 3393.

Cases referred to

Amar Singh v Chin Kiew [1960] MLJ 77; [1960] 1 LNS 5, CA (refd)

Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan [2004] 1 MLJ 411; [2004] 1 AMR 81, CA (refd)
Bank Utama (M) Bhd v Insan Budi Sdn Bhd [2009] 1 MLJ 148; [2009] 1 CLJ 221, CA (refd)
Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd (Shah Alam High Court Civil Suit No 22–117 of 1993), HC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (distd)
Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 3 MLJ 433, HC (refd)
Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 1 MLJ 214, HC (refd)
Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd [1995] 3 AMR 2319, CA (refd)
Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong [2002] 5 MLJ 247, HC (refd)
Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (distd)
Mallett v McMonagale, a minor by Hugh Joseph McMonagle, his father and guardian ad litem, and another [1970] AC 166, HL (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Sime UEP Properties Bhd (dahulunya dikenali sebagai United Estate Projects Bhd) v Woon Nyoke Lin (berniaga sebagai Syarikat Ceritaku) [2002] 4 AMR 4383, CA (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)

Appeal from: Summons No MR28 of 1995 (High Court, Miri)

Tan Thiam Teck (KY Lim and Joyce Chan with him) (Kadir, Wong, Lin & Co) for the appellant.
Mohamad Ivan bin Hussein (Ivan Hussein Advocates & Solicitors) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal lodged by the appellant ('the defendant') is directed against the award of damages in the sum of RM6,747,613.43 handed down by the learned High Court judge in favour of the respondent ('the plaintiff'). The issue of liability for repudiation and breach of contract is not before us.

[2] On 20 October 2010, we heard and dismissed the appeal. At the request of defendant's learned counsel, we now give our grounds.

FACTUAL BACKGROUND

[3] In essence, the plaintiff had sued the defendant for repudiation and breach of contract. Pursuant to the contract, the plaintiff was given the right to develop the defendant's land measuring 4,856 ha (= 12,000 ac) into an oil palm plantation ('the contract').

[4] On 2 April 1997, the learned trial judge found the defendant liable for repudiation and breach of the contract, and ordered damages to be assessed by the learned registrar. Upon assessment, the learned registrar awarded nominal damages of RM10 to the plaintiff.

[5] At the proceedings for assessment before the learned registrar, the plaintiff called PW1's as a witness. PW1's testimony is to the effect that:

(a) the contract value is RM26,990,453.73; and

(b) the plaintiff's estimate in terms of loss of profit is RM6,747,613.43 being 25% of the contract value of RM26,990,453.73.

[6] When PW1 was cross-examined by the defendant's learned counsel, the profit based on 25% of the contract value of RM26,990,453.73 was not challenged.

[7] On the other hand, the defendant through DW1 adduced evidence, in essence, that:

(a) the defendant in another agreement ('the Golden Hope agreement') performed by a third party in another oil palm plantation had adopted the same method used by the plaintiff;

(b) the contract value in the Golden Hope agreement was RM2,726,669.70 and the contract area was 736 hectares; and

(c) using the rates in the Golden Hope agreement, the defendant's estimate in terms of profit was 33.27% of the contract value.

[8] On the above evidence, the learned judge set aside the nominal damages awarded by the learned registrar and substituted it with the sum of RM6,747,613.43, representing the profit based on 25% of the contract value of RM26,990,453.72.

IS THE JUDGE'S AWARD CORRECT?

[9] It was contended by learned counsel Mr Tan Thiam Teck for the defendant that:

(a) the said sum of RM6,747,613.43 is 'just an estimate', and not the actual loss; and

(b) the plaintiff is entitled to nominal damages only.

[10] He cited the following authorities:

(a) *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 (FC);

(b) *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (FC);

(c) *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (HC);

(d) *Sime UEP Properties Bhd (dahulunya dikenali sebagai United Estate Projects Bhd) v Woon Nyoke Lin (berniaga sebagai Syarikat Ceritaku)* [2002] 4 AMR 4383 (CA);

(e) *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd* (Shah Alam High Court Civil Suit No 22–117 of 1993);

(f) *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2004] 1 AMR 81 (CA);

(g) *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214 (HC);

(h) *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 3 AMR 2319 (CA);

(i) *Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247 (HC);

(j) *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 (HC); and

(k) *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 (SC).

[11] Mr Mohd Ivan bin Hussein stressed for the plaintiff that the learned High Court judge had correctly awarded the damages on the basis of the plaintiff's computation in relation to the loss of profit.

[12] In our judgment, it must be immediately emphasised that the defendant's repudiation and breach of contract was in relation to the plaintiff's

right to develop 4,856 ha (= 12,000 ac) of agricultural land into an oil palm plantation, and the plaintiff as contractor was entitled to payment pursuant to the schedule of progress payments incorporated therein. The assessment of damages being an exercise of discretion must be determined on the basis of the facts and circumstances established in each particular case. That being the position, the authorities cited for the defendant would only be useful if they relate to repudiation and breach of a similar type of contract ie to develop a relatively huge area of agricultural land into an oil palm plantation.

[13] With this perspective in mind, we now proceed to examine the authorities on which the defendant relied. The issues discussed in these authorities revolve around the following:

(a) action based on negligence;

(b) no evidence of damages;

(c) different type of contract;

(d) no valid contract; and

(e) damages based on an estimate.

[14] We shall now embark on an analysis of the above issues.

Action based on negligence

[15] In *Guan Soon Tin Mining Co* the claim was based on the appellant's negligence in causing pollution of a fish pond by discharging tailings thereto. The plaintiff had failed to establish the defendant's liability. The Federal Court through the judgment of Ong Hock Thye FJ (later CJ (Malaya)) awarded no damages.

[16] In our respectful view, this authority is irrelevant to the defendant's contention. It had nothing to do with repudiation and breach of contract.

No evidence of damages

[17] In *Popular Industries Limited*, the plaintiff claimed damages for non-delivery of goods and alleged loss of profit on resale. At p 360D rt, Edgar Joseph Jr J (later FCJ) found that the plaintiff had adduced no evidence or no sufficient evidence as to the amount and so it was virtually impossible to assess the damages.

[18] In *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd*, the plaintiff sought damages in the sum of RM2,610,000 for loss of profit, not from the

development of agricultural land into an oil palm plantation, but from projected membership in the swimming centre for five years. Sitting in the Shah Alam High Court, I held that, in the absence of supporting evidence, this was the plaintiff's projection to achieve the said profit which had not taken into account the operation and management costs in relation to the swimming centre. I disallowed this item as it was mere speculation, conjecture or projection.

[19] In *Ban Chuan Trading Co Sdn Bhd*, the appellant and the respondent entered into a tenancy agreement ('T/A') for the rental of property ('the premises'). The appellant, having failed to deliver vacant possession of the premises, admitted liability. The respondent sought damages arising from the loss allegedly suffered by the respondent on the basis of an increase by 20% of the respondent's business upon moving to the premises. The Court of Appeal held that this mere assertion was not supported by evidence.

[20] In *Industrial & Agricultural Distribution Sdn Bhd*, the defendant purchased two units of excavators from the plaintiff. After two months, the defendant requested the plaintiff to take back the excavators, on the ground that they were not suitable for the purpose for which they were bought. The plaintiff sued the defendant for depreciation in the value of the excavators. As there was no proof of any actual depreciation, the High Court merely awarded nominal damages.

[21] In *Letrik Bandar Hup Heng Sdn Bhd* there was a breach of contract for electrical works. However, the respondent's claim for damages was not proved. The respondent was awarded nominal damages of RM10.

[22] The above authorities are not helpful to the defendant herein. In each of them, there was no evidence to support the award of damages. However, in the instant appeal, evidence relating to the loss of profit has been adduced for the parties.

Different type of contract

[23] In *Malaysian Rubber Development Corp Sdn Bhd*, the agreement was for the supply by the plaintiff to the first defendant of two million rubber gloves per month at a total price of US1.8m. In breach of the agreement, the defendant failed to issue an irrevocable letter of credit in favour of the plaintiff. In assessing damages, the High Court awarded the plaintiff, inter alia, RM3.1m for loss of profits based on the proposition that, as there was no available market for the gloves, the measure of damages was the difference between the contract price and the price at which the gloves were eventually sold, and not the difference between the contract price and manufacture cost

since the plaintiff was only obliged to supply the gloves and not manufacture them. On appeal, the (then) Supreme Court held that the proper measure of damages was the difference between the contract price and production costs.

[24] The above facts reveal a different type of contract, and are clearly distinguishable from those in the instant appeal. Hence, no assistance may be derived therefrom.

No valid contract

[25] In *Sime UEP Properties Bhd*, no valid contract existed between the appellant and the respondent, less so any breach thereof.

[26] In *Kokomewah Sdn Bhd*, the High Court held that there was no concluded contract based on the letter of intent and so there was no question of any award of damages. In relation to another contract ie the contract for construction works ie the May 1984 contract, the Court of Appeal held that the May 1984 contract had been properly terminated due to the appellant's default. As the termination of the May 1984 contract was justified, the question of assessment of damages did not exist, (see *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 3 AMR 2319 (CA)).

[27] Upon our analysis of the above authorities cited for the defendant, we are unable to find any support for the defendant's contention.

Estimate

[28] This was considered in *Tan Sri Khoo Teck Puat*, which we shall now examine in the context of the instant appeal.

[29] We are of the view that the plaintiff's claim for damages was supported by the estimate and the consequential computation of 25% of the contract value for the development of the agricultural land into an oil palm plantation in accordance with the contract. In the course of the defendant's cross-examination of the plaintiff's witness ('PW1'), there was no challenge on the 25% profit. There was no resistance by the defendant that the plaintiff's figure was unrealistic or unreasonable. On the contrary, this computation was supported by the defendant's own computation pursuant to the Golden Hope agreement which actually arrived at the estimated profit of 33.27% of the contract value.

[30] The learned trial judge had accepted the evidence adduced for the plaintiff, in particular the computation arrived at by PW1 ie the loss of profit

of RM6,747,613.43 which was awarded to the plaintiff. In doing so, the learned judge referred to *Tan Sri Khoo Teck Puat*, and rejected the defendant's contention that damages could not be based on estimate.

[31] The above contention relating to estimate was canvassed before us. In *Tan Sri Khoo Teck Puat*, the transaction was for the sale and purchase of land in Johor Bahru at the consideration of RM48m for the purpose of development. The purchaser paid some RM4.8m as deposit but failed to pay the balance purchase price. The second appellant terminated the sale agreement and forfeited the deposit. The High Court ordered specific performance of the agreement with damages to be assessed. The assessment of damages led to an award, inter alia, of RM13.5m for loss of profits. On appeal, the (then), Supreme Court held that the judge's basis of assessment could not be supported in law. Be that as it may, at pp 792A–B, Edgar Joseph Jr FCJ (as he then was) applied the dicta of Lord Diplock in *Mallett v McMonagale, a minor by Hugh Joseph McMonagle, his father and guardian ad litem, and another* [1970] AC 166 at p 176 and held, inter alia, that the correct approach for the judge to have adopted when assessing damages, which depends upon a view of what will happen in the future, is that *the court must make an estimate of what are the chances that a particular thing will happen, and whether they are more or less than even*.

[32] In the instant appeal, the plaintiff's computation is not merely based on an estimate of the loss of profit. Such estimate was indeed supported by the defendant's own evidence. The estimate of 25% is actually lower than the 33.27% arrived at by the defendant.

[33] The award of damages by the learned trial judge is primarily based on his finding of facts, having regard to the evidence adduced at the proceedings for assessment of damages. The appeal from the learned registrar to him as judge in chambers is by way of rehearing. We see no appealable error in the learned judge's award of damages. Hence it does not justify any appellate interference.

[34] In *Amar Singh v Chin Kiew* [1960] MLJ 77; [1960] 1 LNS 5, Thomson CJ stated succinctly as follows:

> The fixation of damage is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent, an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

[35] A similar sentiment was shown by this court in *Bank Utama (M) Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148; [2009] 1 CLJ 221, in the following passage:

> [88] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; (ii) that the findings were clearly wrong in law and principle (per Hasan Lah JCA).

CONCLUSION

[36] On the foregoing grounds, we found no merit in this appeal which we dismissed with costs of RM30,000. The decision of the learned judge of the High Court was affirmed. Deposit to the plaintiff (respondent) on account of the fixed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan